



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

PETITION NUMBER E020 OF 2021

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS & HOSPITALS WORKERS UNIONPETITIONER

VERSUS

1. UNIVERSITY OF NAIROBI COUNCIL

2. THE VICE-CHANCELLOR UNIVERSITY OF NAIROBI.....RESPONDENTS

Rika J

Court Assistant: Emmanuel Kiprono

Benson Maina, Senior Legal & Industrial Relations Officer, for the Petitioner.

Fredrick Collins Omondi, Advocate for the Respondents.

JUDGMENT

1. The Petitioner represents Non-teaching Unionisable Employees, at among other Institutions, the University of Nairobi, the Respondent herein.
2. The Petition was triggered by the Respondents' failure to renew fixed-term contracts, of about 100 Employees, members of the Petitioner Union.
3. There was a second lot of about 40 Employees, whose contracts expired subsequently, and were not renewed.
4. In either case, details of the Employees are not given. The Petitioner just gives samples of affected Employees.
5. 2 Applications were filed by the Petitioner with respect to each group of Employees, seeking to bar the Petitioner, from proceeding with termination.
6. Parties agreed that those Applications be joined with the substantive Petition, and determined simultaneously, the provisional orders and the final orders sought, being more or less the same.
7. Parties filed Affidavits in support and response to the Petition respectively. They agreed that the Petition is considered and determined on the strength of these Affidavits and Submissions.
8. They confirmed filing and exchange of Submissions at the last mention before the Court, on 1st October 2021.

Petitioner's case

9. The mainstay of the Petition, is that Respondents' actions are illegal, null and void *ab initio*, because it is the nature of the available work, that should always dictate the nature of contract an Employee should be assigned.

10. The Petitioner's members were unfairly placed on fixed-term contracts, contrary to Article 41 of the Constitution, and the CBA concluded between the Parties. Their nature of work was permanent.

11. The Petitioner submits that most of its members at the University were cleaners, clerks, and security guards. Their nature of work was not suited to fixed- term contracts. They ought to have been permanent and pensionable. The Petitioner submits rather startlingly, that its members' contracts ought to have been '*open –ended and was never to end until and unless the University is closed down altogether.*'

12. Their work was not casual or seasonal but rather, permanent in nature.

13. The Petitioner prays for: -

- a. [Declaration?] That the decisions of the Respondents violate Petitioner's and her members' fundamental rights under Articles 27, 28, 41, 43, and 47 of the Constitution.
- b. An order be issued declaring the Respondents' action of issuing the purported regret letters to the Petitioner's members on purported renewal of contract to be null and void because it is against the Petitioners' members' rights well protected by the CBA between the Parties is subsisting with different contractual provisions.
- c. An order be issued directing the Respondents to recall and reinstate the Petitioners members unconditionally.
- d. Costs to the Petitioner.
- e. Any other suitable order.

14. The prayers, in particular prayer [b], are not clearly articulated. This is not the first time the Court is taking issue with lack of clarity in pleadings, filed by the Petitioner Union.

Respondent's case.

15. The Respondents submit that no particulars with regard to the purported 140 Employees, have been presented to the Court. The Employees whose details are available, had fixed- term contracts of employment. The terms are clearly captured in their respective contracts. The Employees did not protest or reject the fixed-term contracts.

16. The period of employment and the dates of expiry, were known to the Employees. The contracts were renewable. Employees were to apply for renewal. The Respondents were at liberty to renew or not renew the contracts. There was no legitimate expectation of renewal. The nature of work had no bearing on the Respondents' decision to renew or not renew the contracts.

The Court Finds: -

17. The Petition does not disclose details of 140 Employees, on whose behalf, it is presented. The Court cannot grant declaratory orders, and in particular orders of reinstatement, without full details of the Grievants.

18. The Employees whose details have been presented were on fixed-term contracts. Their contracts expired. The expiry date was known to both Parties.

19. The Court would be rewriting expired contracts, and extending the dates of expiry, or setting fresh dates of expiry, by giving orders of reinstatement.

20. Reinstatement restores the contractual terms, including the crucial term of the EDT [Effective Date of Termination]. It would not make sense to restore the EDT, which is well in the past.

21. What the Petitioner is asking the Court, is to rewrite the contracts, alter the EDT, or transform expired fixed-term contracts, into permanent and pensionable employment.

22. This is not the role of the Court – rewriting of contracts of employment.

23. There is no clause in the CBA, or a provision in the Employment Act, or precedent in Judicial Authorities, empowering Courts to rewrite fixed- term contracts. The Petitioner was aware at the time fixed-term contracts issued, about the nature of work its members had been recruited to do. It should have put its case for permanent and pensionable contracts at the point the members were recruited, not wait until they had entered and served the full fixed-term contracts. Cleaning and provision of security in any event, are not the core business of the Respondent. These are services that can be outsourced or provided by temporary labour. The Court does not agree that those who render these functions must be permanent and pensionable.

24. There is no Employer who is condemned to retain an Employee, until that Employer ceases to exist, as propounded by the Petitioner. Contracts of employment all come to an end one way or the other. Employees retire; their contracts expire; they leave on redundancy; they mutually separate before EDT; they leave on notice; or are dismissed on various legal grounds. It is preposterous to tie down the life of a contract of employment, to the life of the Employer. It is ridiculous to hold a view that the University of Nairobi is obliged to retain its Employees, until its demise.

IT IS ORDERED: -

a. The Petition and the accompanying Applications are declined.

b. Costs to the Respondents.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 3RD OF DECEMBER 2021.

JAMES RIKA

JUDGE